


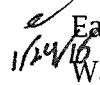
Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** January 24, 2018

Thru: Richard A. Hyde, P.E., Executive Director

Thru:  Brent Wade, Deputy Director
Office of Waste

From:  Earl Lott, Division Director
Waste Permits Division

Subject: Rulemaking Draft Concept and Initiation Memo
Chapter 352, Coal Combustion Residuals

Suggested short title: SB 1 (Rider 31) and Permit Program for Coal Combustion Residuals (CCR) Implementation

Introduction and reason(s) for the rulemaking:

The United States Environmental Protection Agency (EPA) promulgated standards to regulate Coal Combustion Residuals (CCR) under the Resource Conservation Recovery Act (RCRA), Subtitle D at 40 Code of Federal Regulations (CFR) Part 257, which became effective October 19, 2015. 40 CFR Part 257 is self-implementing, therefore no rulemaking by the executive director is required, and CCR units must comply with federal standards by October 19, 2018. In December 2016, the Water Infrastructure for Improvements to the Nation Act (WIIN Act) took effect amending the federal Solid Waste Disposal Act. The WIIN Act provides states an opportunity to seek EPA approval of a state CCR permitting program, or "other system of prior approval" to operate in lieu of federal regulation of CCR facilities.

The Texas General Appropriations Act (Act) was passed on June 12, 2017. The Act contained a rider to fund four new full-time employees for the TCEQ to initiate and manage a CCR program (See Senate Bill 1-Conference Committee Report, Rider 31, 2018-2019 State Budget (May 2017)).

Scope of the proposed rule:

The proposed rulemaking would create 30 Texas Administrative Code (TAC) Chapter 352 to adopt the requirements of 40 CFR Part 257, Subpart D, and implement procedural requirements meeting federal standards for a registration and compliance monitoring program to review and authorize CCR units.

A.) Scope required by federal regulations or state statutes:

The State of Texas is not required by either federal regulations or state statutes to implement a CCR program or to adopt federal standards for CCR units. If Texas adopts the rulemaking and develops a program, the executive director will submit the rules and proposed program to the EPA for review and delegation of the state CCR program.

B.) Additional staff recommendations:

None.

Potential controversial concerns and legislative interest:

Environmental groups have publicly committed to participating in CCR program implementation around the nation. The United States Court of Appeals District of Columbia Circuit is deliberating on a legal challenge brought by the Utilities Solid Waste Activities Group challenging portions of the final federal rule, 40 CFR Part 257. In addition, environmental groups brought the first compliance challenges against facilities under the new 40 CFR Part 257 federal regulations, and final decisions for interpreting and applying the coal ash rule are pending. The 40 CFR Part 257 rules are being remanded to EPA for reconsideration.

Potential alternatives:

40 CFR Part 257 is self-implementing for regulated facilities, and may be enforced through citizen suit authority found in RCRA at 42 United States Code, §6972 until the State of Texas is delegated the CCR program and issues registrations to the regulated facilities. Under the WIIN Act, if Texas does not choose to pursue rulemaking and implementation of a program, the EPA must implement a CCR permitting program and Texas facilities would be required to seek federal authorizations.

Effect on the:

A.) Regulated community:

Electric utilities and independent power producers are required to comply with 40 CFR Part 257 and provide groundwater monitoring data on public websites by March 2018. After adoption of the agency's CCR rule, the executive director would develop an application for a new CCR registration and a compliance monitoring function. The process will include notice to the public, opportunity for a public meeting, and technical review of the application. Once Texas has received delegation of the CCR program, existing and new facilities will apply for and obtain a CCR authorization, and the agency will begin conducting compliance or complaint inspections.

B.) Public:

There would be no direct impact to the public anticipated with this rulemaking. The proposed rules would allow members of the public to provide comments for the executive director's consideration. Proposed new Chapter 352 would not provide an opportunity for a contested case hearing, so there would not be a new group of affected persons from this rulemaking.

C.) Agency programs:

Office of Waste:

- Waste Permits Division:
 - Industrial and Hazardous Waste Permits Section – Rule writing, program development, application and report reviews, potential for public meetings and hearings
 - Business & Program Services Section – Document processing

- Remediation Division/ IHW Corrective Action Program – Corrective action and potential involvement in referral to enforcement

Office of Legal Services:

- Environmental Law Division – Rule writing, program development, meetings with regulated entities' legal representatives, rule interpretation
- Litigation Division – potential disputes, hearings and referral to enforcement

Office of Compliance and Enforcement – Compliance requests, compliance inspections, response to complaints, program referrals to enforcement

Office of Administrative Services/Financial Administration Division – Potential financial assurance requirement

Proposed schedule and constraints:

Anticipated Proposal Date: June 20, 2018

Anticipated Public Comment Period: July 6, 2018 - August 6, 2018

Anticipated Adoption Date: November 14, 2018

Planned Stakeholder involvement:

A stakeholder meeting is not scheduled for this rulemaking; however, a public hearing would be held during the rulemaking public comment period.

Statutory authority:

The proposed new chapter is authorized by Texas Water Code (TWC), §5.103, which establishes the commission's general authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of this state.

The proposed new chapter is also authorized under Texas Health and Safety Code (THSC), §361.090(d), which authorizes the commission to adopt rules under THSC, §361.024 to control the collection, handling, storage, processing, and disposal of industrial solid waste to protect property of others, public property and rights-of-way, groundwater, and other rights requiring protection.

THSC, §361.024 also authorizes the commission to adopt rules to establish minimum standards of operation for the management and control of solid waste.

Direction and Guidance:

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Rule or Non-Rule Project number: 2017-037-352-WS

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Attachments:

SB 1, Rider 31

40 CFR Part 257

NOTE: *TR will submit electronic notice to the following after ED Briefing:*

Stephen Tatum
Jim Rizk
Office of General Counsel